

Duty to Avoid Related Party Transactions

- **s 208(1): Only applies to public co's.**
- s 207: Purpose: protect interests of public co's members as whole, by requiring SH approval for related party transactions.
- **Mandatory rules: cannot be overwritten.**

Regarding Related Company Transactions

Step 1: Define a Related Party

- **s 228: Related parties are:**
- (1): Controlling entities (holding company)
- (2): Ds of co/controlling entity (holding company) and their spouses

Determining Whether Co. 'Controls'

- s 50AA (1): if it has capacity to determine outcome of financial & operating policies:
 - (a) practical influence;
 - (b) practice/pattern behaviour affecting the entity's financial or operating policies is to be taken into account.
- (3) mere capacity to determine outcomes ≠ control.
- (4) legal obligation to confer benefit of someone other than shareholder ≠ control.
- (3) Relatives of Ds & spouses of company/controlling entity (parents and children).
- (4) Entity controlled by parties in (1)-(3), unless the entity is controlled by company.
- (7) An entity who acts in concert with another related party on understanding they will both receive financial benefits
- ASIC v Adler: list not exhaustive.

Step 2: Define 'Financial Benefit'

- **s 229: Giving a financial benefit means:**
- (1)(a) **Broad interpretation**, even when crim/civil penalties may be involved; AND
- (b) Economic & commercial **substance** of conduct is to **prevail over legal form**; AND
- (c) **Disregard any consideration** that is/ may be given for benefit.
- (2) Giving financial benefit defined: includes
 - (a) Giving financial benefit **indirect**
 - (b) Giving it by **informal agreement**, oral agreement with no binding force;
 - (c) Giving **without paying for benefit**.
- (3) Examples:
 - (a) Giving **property/finance** (b) **Buying** asset from, **selling** to; (c) **Leasing**; (d) **Supplying** services; (e) **Issuing** securities; (f) Releasing an **obligation**.

Step 3: Obtain Member Approval

- s 208 **Need for member approval** - a public company (or a company controlled by a public company) can only give a benefit to a related company if either:
 - **(a)(i) obtains approval of the co's members set out in ss 217-227; and**
 - **(ii) give the benefit within 15 months after the approval; OR**

Step 4: See Whether Exceptions Apply

- **s 208(b) giving of benefit falls within an exception set out in sections 210 to 216.**
- s 210: **arm's length transactions**, or those less favourable to related party;
- s 211: benefit is **reasonable remuneration** of officer/employee of company or other...
- s 212: it is a **payment for indemnities**, exemptions or **insurance premiums**; for **legal costs** in defending officer's liability;
- s 213: small amounts **not exceeding \$5000 to a director or spouse**;
- s 214: **benefit given to or by a closely-held subsidiary** (one that would be totally owned if non-voting shares disregarded)
- s 215: benefits which **do not discriminate amongst members given to member**.
- s 216: benefits given under **court order**.

Step 5: Outline Procedure for Approval

s 217-227: Procedure for Approval

- s 217: approval may be given by reference to class/kind of benefit;
- s 218: at least 14 days before meeting company must lodge information with ASIC.
- **CHECK NOTICE REQUIREMENTS FOR GM**
- s 219(1)(a),(b): must prepare statement setting out related parties, nature of benefits.
- s 219(1)(c),(d): statement must set out recommendation of each d.
- s 219(1)(e): statement must contain all such info known to the company/any its Ds that is reasonable required by members
- s 224(1): at GM, vote on proposed resolution must not be cast by/on behalf of related party who would benefit under resolution/an associate of such related party.
- ss 225(3)-(5): votes cast by each member voting, in person or by proxy, must be recorded in writing.
- s 226: within 14 days after resolution passed, public co must lodge with ASIC notice setting out text of resolution.
- s 227(1): court may declare conditions prescribed here have been satisfied if it finds they have been substantially satisfied.

Step 6: Outline the Consequences of Breach

s 209 Consequences of breach:

- (1)(a) contravention does not affect the validity of any contract or transaction connected with the giving of the benefit; AND
- (1)(b) public co NOT guilty of an offence.
- **Note: Court may order an injunction to stop the company or entity giving the benefit to the related party (s 1324).**
 - (2) However, civil penalty provision against people 'involved' with the contravention (s 79 defines 'involved')
 - (3) persons involved in contravention AND were **dishonest** are guilty of an **offence**.
- s 230: general law duties still apply.